In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1145

ROOSEVELT MCKITTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment order of the court of appeals was entered on January 14, 1976 (Pet. App. A). The petition for a writ of certiorari was filed on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence showed that petitioner was entrapped as a matter of law.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of possession of marihuana with intent to distribute, in

violation of 21 U.S.C. 841(a)(1), conspiracy to commit that offense, in violation of 21 U.S.C. 846, and the importation of marihuana, in violation of 21 U.S.C. 952(a)(2) and 960. He was sentenced to three concurrent terms of five years' imprisonment, to be followed by two years' special parole on each count. The court of appeals affirmed (Pet. App. A).

The evidence showed that on August 17, 1974, government informant Keegan introduced petitioner to Special Agent Charles Crane of the Drug Enforcement Administration, who was posing as an Eastern Airlines employee at the Newark International Airport (Tr. 1.33-1.36, 1.38). At their initial meeting, petitioner informed Crane that he intended to import 1,000 pounds of marihuana into the United States each week and offered Crane $16,000 per shipment if he could arrange for the drugs to clear Customs without detection (Tr. 1.36-1.37). Crane suggested that the drugs should be shipped as personal effects. Petitioner stated that he already intended to use that method and informed the agent that the drugs would be shipped to an individual consignee in New Jersey (Tr. 1.37-1.38).

In response to Crane's demand for a show of good faith, petitioner lead him to a service station in Elizabeth, New Jersey. Upon their arrival, petitioner showed Crane a large sum of money and promised to contact him in the future (Tr. 1.38-1.41).

On August 22, 1974, petitioner arranged another meeting with Crane through the informant (Tr. 1.41, 2.86). During this conversation, petitioner informed the agent that his first shipment of marihuana from Jamaica would be arriving in Newark that evening on Eastern Airlines (Tr. 1.41-1.43). Crane informed petitioner that he would need the airway bill number on the crate in order to pass the shipment through Customs. Petitioner instructed Crane to call him the following morning to obtain the number (Tr. 1.43-1.44).

BLEED THROUGH

After that meeting, Crane and several other agents drove to the Eastern Airlines cargo terminal at Newark Airport, where they located a 385-pound crate of marihuana addressed to George Williams of Newark (Tr. 1.51, 1.53, 3.59-3.60, 3.62-3.63). The crate was resealed and placed in the custody of Customs officials (Tr. 1.59). When Crane telephoned the following morning, petitioner provided him with the airway bill number of the package consigned to Williams (Tr. 1.91-1.92).

A controlled delivery of the marihuana was made to petitioner at the service station in Elizabeth (Tr. 2.21-2.22). After petitioner exhibited a sum of money to Crane, the agent informed him that the marihuana would be delivered momentarily (Tr. 2.22). Crane left and returned immediately in a van containing the shipment. Petitioner told Crane that he was not ready to accept delivery because his own van had not yet arrived (Tr. 2.23).

Shortly thereafter, a van driven by co-defendant Bravo arrived at the service station (Tr. 2.26).[1] After conferring with petitioner, Bravo positioned his truck to transfer the marihuana from the agent's van. Bravo opened the crate and verified its contents. But when he attempted to remove the crate, Crane demanded that he first receive payment. Petitioner eventually handed Crane a brown paper bag containing approximately $5,000 (Tr. 2.25-2.31, 2.35, 2.38-2.40). The crate then was transferred to Bravo's van (Tr. 2.35). Petitioner was later arrested near the service station (Tr. 4.36-4.37). Bravo had driven the van some distance from the delivery point before he was arrested (Tr. 3.76-3.77, 3.118-3.119).

Petitioner testified in his own defense that a friend, Gerald Williams, had asked him if he knew anyone in

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[1]Bravo was also convicted of possession of marihuana with intent to distribute, but was acquitted on the other counts.

Jamaica with marihuana (Tr. 3.239).[2] He stated that when he ascertained that Sam Woods could provide the drugs, he informed Williams that he had located a supplier (Tr. 3.239-3.240). Williams then suggested that petitioner telephone government informant Keegan to obtain transportation for the shipment (Tr. 3.239).[3] Petitioner admitted that he called the informant to arrange their first meeting (Tr. 3.239, 4.50). He stated that Keegan asked him to obtain credit to finance the transaction, to which he eventually agreed (Tr. 3.242-3.243, 3.247, 4.36).

Petitioner also testified that after approximately two months' planning of the operation, the informant introduced him to agent Crane (Tr. 4.12). Although petitioner contended that Crane had informed him of the flight and arrival time of the shipment, he admitted that he had called Sam Woods to obtain the airway bill number of the crate (Tr. 4.17, 4.30). He also admitted that he had asked co-defendant Bravo to rent the van for him (Tr. 4.24).

ARGUMENT

1. Petitioner contends (Pet. 8-9) that the evidence showed that he was entrapped as a matter of law. He argues that the testimony of the government witnesses proves that the crimes charged in the indictment originated from the "creative activity" of the government informant and agent Crane.

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[2]Petitioner claims (Pet. 6) that Williams sought to obtain the marihuana on behalf of government informant Keegan. But petitioner testified that Williams specifically informed him that he was acting on behalf of Joe Taylor (Tr. 3.239).

[3]Neither Williams nor Keegan was called as a witness at trial, although "out of an abundance of caution," the court specifically inquired whether the defense wished to question the informant (Tr. 2.91-2.97, 3.8-3.22).

Keegan's previous connections with the Union County, New Jersey, prosecutor's office were fully disclosed to the jury (Tr. 2.55-2.56). Petitioner never claimed, and actively disavowed any intention to prove, that Williams acted as a government agent (Tr. 4.42-4.44).

BLEED THROUGH

Petitioner's own testimony, however, demonstrates that his marihuana importation scheme had been devised before he contacted the government informant and was virtually fully matured before he was introduced to agent Crane. The evaluation of the credibility of the government's witnesses and of petitioner and of the weight to be given their testimony was for the jury, which under proper instructions resolved those issues adversely to petitioner.[4]

The principal inquiry in determining entrapment is the defendant's predisposition to commit the offense. *United States* v. *Russell*, 411 U.S. 423, 433; *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976. Agent Crane's testimony established that petitioner was predisposed to commit these crimes.

When first introduced to Crane at the airport, petitioner informed him that he intended to import 1,000 pounds of marihuana per week and offered him up to $16,000 per shipment if he could circumvent Customs inspection. Five days later, petitioner informed Crane that he had arranged for the first shipment to arrive that very day. Petitioner also directed Bravo to rent the van which was later used to transport the contraband. Crane's testimony contains no suggestion that either Keegan or he induced petitioner to organize this importation plan or to provide ground transportation.

Petitioner's own testimony confirmed the independent origin of the scheme. Although petitioner claimed that he acted solely at Keegan's behest to help him with his financial problems, the jury was entitled to disbelieve petitioner's version of Keegan's role in the enterprise. Thus, as the court of appeals properly held (Pet. App. 2a n. 1), the evidence was sufficient to permit the jury to conclude that petitioner was predisposed to commit the crimes.

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[4]Petitioner does not object to the instructions given the jury.

2. Petitioner also contends (Pet. 9-10) that since the government seized the marihuana at the airport prior to its controlled delivery to him, the government in effect supplied him with the contraband he was charged with possessing and therefore is precluded from prosecuting him for importation and possession with intent to distribute those drugs. But by his own admission, petitioner arranged for the importation of this marihuana from a nongovernmental source in Jamaica. He cannot now complain because the contraband was detected upon entry into this country and its final delivery was carried out under governmental supervision. See *Hampton* v. *United States, supra; United States* v. *Arias-Diaz*, 497 F. 2d 165 (C.A. 5); *United States* v. *Kohn*, 365 F. Supp. 1031 (E.D. N.Y.), affirmed, 495 F. 2d 763 (C.A. 2); cf. *United States* v. *Barnard*, 490 F. 2d 907 (C.A. 9), certiorari denied, 416 U.S. 959.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys.

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